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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/802,342	03/17/2004	Peter M.J. Bedding	7593-CIP	3643
22922 7590 09/11/2007 REINHART BOERNER VAN DEUREN S.C. ATTN: LINDA KASULKE, DOCKET COORDINATOR 1000 NORTH WATER STREET SUITE 2100 MILWAUKEE, WI 53202			EXAMINER GHALI, ISIS A D	
			ART UNIT 1615	PAPER NUMBER
			MAIL DATE 09/11/2007	DELIVERY MODE PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	Application No. 10/802,342	Applicant(s) BEDDING ET AL.	
	Examiner Isis A. Ghali	Art Unit 1615	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 1 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-60 is/are pending in the application.  
     4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☐ Claim(s) \_\_\_\_ is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 8) ☒ Claim(s) 1-60 are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
     Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
     Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
     a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |   |  |
|---|--|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)  | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. ____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                      | 5) <input type="checkbox"/> Notice of Informal Patent Application                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date ____ | 6) <input type="checkbox"/> Other: ____  |

### **DETAILED ACTION**

Claims 1-60 are pending.

#### ***Election/Restrictions***

1. Restriction to one of the following inventions is required under 35 U.S.C. 121:
  - I. Claims 1-38, drawn to nutritional product comprising polar lipid, soluble fibers, nutricine and protein concentrate, classified in class 424, subclass 439.
  - II. Claim 39, drawn to feed supplement comprising oat oil,  $\beta$ -glucan, nutricine containing nucleotides, surfactant amino acid, and whey protein, classified in class 424, subclass 439.
  - III. Claims 40-54, drawn to nutritional product comprising four ingredients identified by their function, classified in class 424, subclass 439.
  - IV. Claim 55, drawn to nutritional product comprising polar lipid, nutricine and protein concentrate, classified in class 424, subclass 439.
  - V. Claims 56-57, drawn to nutritional product comprising polar lipid, soluble fibers, and nutricine, and nominal method of its making, classified in class 424, subclass 439.

- VI. Claim 58, drawn to method of making nutritional product comprising polar lipid, soluble fibers, nutricine, second nutricine and protein concentrate, classified in class 424, subclass 439.
- VII. Claim 59, drawn to method of feeding a nutritional product comprising polar lipid, soluble fibers, nutricine, and protein concentrate, classified in class 424, subclass 439.
- VIII. Claim 60, drawn to method for utilizing a nutritional product for use in administering a medication wherein the nutritional product comprising polar lipid, soluble fibers, nutricine, protein concentrate and medication, classified in class 424, subclass 439.

**The inventions are distinct, each from the other because of the following reasons:**

2. Inventions I and II are unrelated. Inventions are unrelated if it can be shown that they are not disclosed as capable of use together and they have different designs, modes of operation, and effects (MPEP § 802.01 and § 806.06). In the instant case, the different inventions have different designs, and the prior art that anticipates claim 1 may not anticipate claim 39. Additionally, claim 1 does not require nutricine that contains nucleotide or surfactant amino acid-based nutricine as required by claim 39.

3. Inventions I and III are unrelated. Inventions are unrelated if it can be shown that they are not disclosed as capable of use together and they have different designs,

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modes of operation, and effects (MPEP § 802.01 and § 806.06). In the instant case, the different inventions have different designs, and the prior art that anticipates claim 1 may not anticipate claim 40. Additionally, claim 40 does not require any specific ingredients as required by claim 1.

4. Inventions I and IV are unrelated. Inventions are unrelated if it can be shown that they are not disclosed as capable of use together and they have different designs, modes of operation, and effects (MPEP § 802.01 and § 806.06). In the instant case, the different inventions have different designs, and the prior art that anticipates claim 1 may not anticipate claim 55. Additionally, claim 55 does not require soluble fibers that are required by claim 1. Additionally, claim 55 require polar lipid high in galactolipids and antioxidants that not required by claim 1.

5. Inventions I and V are unrelated. Inventions are unrelated if it can be shown that they are not disclosed as capable of use together and they have different designs, modes of operation, and effects (MPEP § 802.01 and § 806.06). In the instant case, the different inventions have different designs, and the prior art that anticipates claim 1 may not anticipate claim 56. Additionally, claim 56 does not require protein concentrate that is required by claim 1.

6. Inventions I and VI are unrelated. Inventions are unrelated if it can be shown that they are not disclosed as capable of use together and they have different designs,

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modes of operation, and effects (MPEP § 802.01 and § 806.06). In the instant case, the different inventions have different designs, and the prior art that anticipates claim 1 may not anticipate claim 58. Additionally, claim 58 requires two nutricines while claim 1 requires only one nutricine.

7. Inventions I and VII are related as product and process of use. The inventions can be shown to be distinct if either or both of the following can be shown: (1) the process for using the product as claimed can be practiced with another materially different product or (2) the product as claimed can be used in a materially different process of using that product. See MPEP § 806.05(h). In the instant case the product as claimed can be used in a materially different process of using that product because product of claim 1 not necessary given as a feed as required by the process of claim 59, and the product of claim 1 could be given parenterally or enterally or as a tablet.

8. Inventions I and VIII are related as product and process of use. The inventions can be shown to be distinct if either or both of the following can be shown: (1) the process for using the product as claimed can be practiced with another materially different product or (2) the product as claimed can be used in a materially different process of using that product. See MPEP § 806.05(h). In the instant case the process for using the product as claimed can be practiced with another materially different product because the product of claim 1 does not require medication as required by claim 60.

9. Inventions II and inventions III-VIII are unrelated. Inventions are unrelated if it can be shown that they are not disclosed as capable of use together and they have different designs, modes of operation, and effects (MPEP § 802.01 and § 806.06). In the instant case, the different inventions have different designs because invention II require surfactant amino acid-based nutritive that is not required by any of the other inventions.

10. Inventions III and inventions I, II, IV-VIII are unrelated. Inventions are unrelated if it can be shown that they are not disclosed as capable of use together and they have different designs, modes of operation, and effects (MPEP § 802.01 and § 806.06). In the instant case, the different inventions have different designs, and claim 40 does not require any specific ingredients as required by the other groups.

11. Inventions IV and inventions I-III and V-VIII are unrelated. Inventions are unrelated if it can be shown that they are not disclosed as capable of use together and they have different designs, modes of operation, and effects (MPEP § 802.01 and § 806.06). In the instant case, the different inventions have different designs because invention IV does not require soluble fibers that are required by the other groups.

12. Inventions V and inventions I-IV and VI-VIII are unrelated. Inventions are unrelated if it can be shown that they are not disclosed as capable of use together and

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they have different designs, modes of operation, and effects (MPEP § 802.01 and § 806.06). In the instant case, the different inventions have different designs because invention V does not require protein concentrate that is required by the other groups.

13. Inventions VI and inventions I-V and VII-VIII are unrelated. Inventions are unrelated if it can be shown that they are not disclosed as capable of use together and they have different designs, modes of operation, and effects (MPEP § 802.01 and § 806.06). In the instant case, the different inventions have different designs because invention VI requires two nutricines while the other groups require only one nutricine.

14. Inventions VII and inventions I-VI and VIII are unrelated. Inventions are unrelated if it can be shown that they are not disclosed as capable of use together and they have different designs, modes of operation, and effects (MPEP § 802.01 and § 806.06). In the instant case, the different inventions have different designs because inventions I-VI and VIII are not necessary given as a feed as required by the process of claim 59, and the product of claim 1 could be given parenterally or enterally or as a tablet.

15. Inventions VIII and inventions I-VII are unrelated. Inventions are unrelated if it can be shown that they are not disclosed as capable of use together and they have different designs, modes of operation, and effects (MPEP § 802.01 and § 806.06). In



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the instant case, the different inventions have different designs because invention VIII d requires medication that not required by any other inventions.

16. Because these inventions are independent or distinct for the reasons given above and there would be a serious burden on the examiner if restriction is not required because the inventions require a different field of search (see MPEP § 808.02), restriction for examination purposes as indicated is proper.

17. Because these inventions are independent or distinct for the reasons given above and there would be a serious burden on the examiner if restriction is not required because the inventions have acquired a separate status in the art due to their recognized divergent subject matter, restriction for examination purposes as indicated is proper.

**Should applicant elect invention I, the following species election is required:**

18. This application contains claims directed to the following patentably distinct species: polar lipid:

- (a) antioxidant,
- (b) lipid of oat, and
- (c) oil selected from the oils listed in claim 4.

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The species are independent or distinct because antioxidant can be a vitamin that is structurally different from lipid of oat or oat oil, and the prior art that anticipates one species may not anticipate the other.

Applicant is required under 35 U.S.C. 121 to elect a single disclosed species for prosecution on the merits to which the claims shall be restricted if no generic claim is finally held to be allowable. Currently, claim 1 is generic.

Applicant is advised that a reply to this requirement must include an identification of the species that is elected consonant with this requirement, and a listing of all claims readable thereon, including any claims subsequently added. An argument that a claim is allowable or that all claims are generic is considered nonresponsive unless accompanied by an election.

Upon the allowance of a generic claim, applicant will be entitled to consideration of claims to additional species which depend from or otherwise require all the limitations of an allowable generic claim as provided by 37 CFR 1.141. If claims are added after the election, applicant must indicate which are readable upon the elected species.

MPEP § 809.02(a).

19. This application contains claims directed to the following patentably distinct species: soluble fibers:

- (a) oligosaccharide, and
- (b) beta glucan.

The species are independent or distinct because beta glucan is polysaccharide that is structurally different from oligosaccharide, and the prior art that anticipates one species may not anticipate the other.

Applicant is required under 35 U.S.C. 121 to elect a single disclosed species for prosecution on the merits to which the claims shall be restricted if no generic claim is finally held to be allowable. Currently, claim 1 is generic.

Applicant is advised that a reply to this requirement must include an identification of the species that is elected consonant with this requirement, and a listing of all claims readable thereon, including any claims subsequently added. An argument that a claim is allowable or that all claims are generic is considered nonresponsive unless accompanied by an election.

Upon the allowance of a generic claim, applicant will be entitled to consideration of claims to additional species which depend from or otherwise require all the limitations of an allowable generic claim as provided by 37 CFR 1.141. If claims are added after the election, applicant must indicate which are readable upon the elected species.  
MPEP § 809.02(a).

20. This application contains claims directed to the following patentably distinct species: nutricine:

- (a) nucleotides,
- (b) yeast cell extract, and
- (c) yeast cell wall.

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The species are independent or distinct because the species are structurally different and the prior art that anticipates one species may not anticipate the other.

Applicant is required under 35 U.S.C. 121 to elect a single disclosed species for prosecution on the merits to which the claims shall be restricted if no generic claim is finally held to be allowable. Currently, claim 1 is generic for nutricine.

Applicant is advised that a reply to this requirement must include an identification of the species that is elected consonant with this requirement, and a listing of all claims readable thereon, including any claims subsequently added. An argument that a claim is allowable or that all claims are generic is considered nonresponsive unless accompanied by an election.

Upon the allowance of a generic claim, applicant will be entitled to consideration of claims to additional species which depend from or otherwise require all the limitations of an allowable generic claim as provided by 37 CFR 1.141. If claims are added after the election, applicant must indicate which are readable upon the elected species. MPEP § 809.02(a).

21. This application contains claims directed to the following patentably distinct species: additional component to the composition of claim 1:

- (a) nutricine that stimulates the formation of nucleotides,
- (b) vitamin E,
- (c) mineral micronutritional additive, and
- (d) medication.

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The species are independent or distinct because the species are structurally different and the prior art that anticipates one species may not anticipate the other.

Applicant is required under 35 U.S.C. 121 to elect a single disclosed species for prosecution on the merits to which the claims shall be restricted if no generic claim is finally held to be allowable. Currently, claim 1 is generic.

Applicant is advised that a reply to this requirement must include an identification of the species that is elected consonant with this requirement, and a listing of all claims readable thereon, including any claims subsequently added. An argument that a claim is allowable or that all claims are generic is considered nonresponsive unless accompanied by an election.

Upon the allowance of a generic claim, applicant will be entitled to consideration of claims to additional species which depend from or otherwise require all the limitations of an allowable generic claim as provided by 37 CFR 1.141. If claims are added after the election, applicant must indicate which are readable upon the elected species.

MPEP § 809.02(a).

**Should applicant elect invention III, the following species election is required:**

22. This application contains claims directed to the following patentably distinct species: nutricine:

- (a) yeast cell extract, and
- (b) yeast cell wall.

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The species are independent or distinct because the species are structurally different and the prior art that anticipates one species may not anticipate the other.

Applicant is required under 35 U.S.C. 121 to elect a single disclosed species for prosecution on the merits to which the claims shall be restricted if no generic claim is finally held to be allowable. Currently, claim 40 is generic.

Applicant is advised that a reply to this requirement must include an identification of the species that is elected consonant with this requirement, and a listing of all claims readable thereon, including any claims subsequently added. An argument that a claim is allowable or that all claims are generic is considered nonresponsive unless accompanied by an election.

Upon the allowance of a generic claim, applicant will be entitled to consideration of claims to additional species which depend from or otherwise require all the limitations of an allowable generic claim as provided by 37 CFR 1.141. If claims are added after the election, applicant must indicate which are readable upon the elected species.  
MPEP § 809.02(a).

23. This application contains claims directed to the following patentably distinct species: additional component to the composition of claim 40:

- (a) nutricine that stimulates the formation of nucleotides,
- (b) vitamin E, and
- (c) mineral micronutritional additive.

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The species are independent or distinct because the species are structurally different and the prior art that anticipates one species may not anticipate the other.

Applicant is required under 35 U.S.C. 121 to elect a single disclosed species for prosecution on the merits to which the claims shall be restricted if no generic claim is finally held to be allowable. Currently, claim 40 is generic.

Applicant is advised that a reply to this requirement must include an identification of the species that is elected consonant with this requirement, and a listing of all claims readable thereon, including any claims subsequently added. An argument that a claim is allowable or that all claims are generic is considered nonresponsive unless accompanied by an election.

Upon the allowance of a generic claim, applicant will be entitled to consideration of claims to additional species which depend from or otherwise require all the limitations of an allowable generic claim as provided by 37 CFR 1.141. If claims are added after the election, applicant must indicate which are readable upon the elected species. MPEP § 809.02(a).

24. Because the above restriction/election requirement is complex, a telephone call to the applicant's agent to request oral election was not made. See MPEP, Sec.812.01.

25. Applicant is advised that the reply to this requirement to be complete must include (i) an election of a species or invention to be examined even though the

requirement be traversed (37 CFR 1.143) and (ii) identification of the claims encompassing the elected invention.

The election of an invention or species may be made with or without traverse. To reserve a right to petition, the election must be made with traverse. If the reply does not distinctly and specifically point out supposed errors in the restriction requirement, the election shall be treated as an election without traverse.

Should applicant traverse on the ground that the inventions or species are not patentably distinct, applicant should submit evidence or identify such evidence now of record showing the inventions or species to be obvious variants or clearly admit on the record that this is the case. In either instance, if the examiner finds one of the inventions unpatentable over the prior art, the evidence or admission may be used in a rejection under 35 U.S.C.103(a) of the other invention.

26. Applicant is reminded that upon the cancellation of claims to a non-elected invention, the inventorship must be amended in compliance with 37 CFR 1.48(b) if one or more of the currently named inventors is no longer an inventor of at least one claim remaining in the application. Any amendment of inventorship must be accompanied by a request under 37 CFR 1.48(b) and by the fee required under 37 CFR 1.17(i).

27. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Isis A. Ghali whose telephone number is (571) 272-0595. The examiner can normally be reached on Monday-Thursday, 7:00 to 5:30.



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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael Woodward can be reached on (571) 272-8373. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Isis A Ghali  
Primary Examiner  
Art Unit 1615

*Isis Ghali*

IG

ISIS GHALI  
PRIMARY EXAMINER